Nos. 20261 and 20262

# United States
# COURT OF APPEALS
## for the Ninth Circuit

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GEORGE HANN, et al,

*Appellants,*

v.

J. J. NAYLOR,

*Appellee.*

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## APPELLANTS' BRIEF

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*Appeal from the United States District Court for the District of Oregon*

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"[T]he law of contracts does not judge a promisor's obligation by what is in his mind, but by the objective test of what his promise would be understood to mean by a reasonable man in the situation of the promisee." *Lee* v. *State Bank & Trust Co.,* 54 F.2d 518, 521 (2d Cir. 1931).

## STATEMENT OF JURISDICTION

These causes were brought by the appellants against the appellee under provision of Sec. 301 of the

Labor-Management Relations Act (29 U.S.C. § 185) in the United States District Court for the District of Oregon. They were suits concerning the violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. The jurisdiction of the District Court was admitted by all parties (R. 1, 2), and the District Court ruled that there was no question of jurisdiction involved (Tr. 10).

The appellant Trust Funds come within the ambit of Sec. 302 (c) (5) of the Labor-Management Relations Act, 29 U.S.C. § 186 (c) (5). The Funds serve both Oregon and Southwest Washington (Exs. 2, 3), and the master Carpenters Labor Agreements covering Oregon and Southwest Washington (Exs. 4, 5). The Trust Agreements for both the Pension and the Health and Welfare Funds and the master Carpenters Labor Agreements were created and executed by certain employer associations and labor organizations, all of whom together represent employers and employees, respectively, in the States of Oregon, Washington, California and Idaho (Exs. 2, 3, 4, 5).

The Court has jurisdiction to review the judgment of the District Court by virtue of 28 U.S.C. § 1291. Judgment was entered in both cases (consolidated) on May 13, 1965 (R. 22, 26). Notice of appeal was perfected on June 9, 1965 (R. 23, 26).

## STATEMENT OF THE CASE

### Preliminary Statement of Facts:

On August 7, 1964, the appellants, as Trustees for the Oregon-Washington Carpenters-Employers Health and Welfare Trust Fund, filed complaint against the appellee, claiming that appellee was delinquent in making contributions to appellants on the man-hours worked by his carpenter employees (R. 22). At the same time, the appellants, as Trustees for the Oregon-Washington Carpenters-Employers Pension Trust Fund, filed a similar suit (R. 25). On December 23, 1964, the two suits were consolidated for pre-trial conference and trial (R. 22, 25)[1].

The central question on this appeal is whether or not appellee ever bound himself to the terms of the Trust Agreements (Exs. 2 and 3) and to the terms of certain parts of the collective bargaining agreements[2]

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[1] The issues in both suits are substantially the same, and for the purpose of this appeal, there is no materiality in distinguishing the two cases.

[2] Those specific parts of the collective bargaining agreements are Articles XVII and XVIII of the Carpenters Labor Agreement, dated May 28, 1962 (Ex. 5) and Article XX of the Carpenters Labor Agreement, dated April 1, 1959 (Ex. 4), which provide in effect that all employers coming under the scope of the agreement shall contribute 10 cents for each man-hour worked by his carpenter-employees to each of the Funds up to and including April 14, 1963, and 15 cents per man-hour worked thereafter to each of the Funds. (R. 2) Said Articles further provide that said obligation shall be effective to and including April 14, 1965. The pertinent text of said Article XVII is given in Appendix A hereto. Said Article XX of the Carpenters Labor Agreement for that period from April 1, 1959, to May 30, 1962, (Ex. 4) contains similar provision except that there is no reference to the Pension Fund because the Pension Fund was not at that time in existence.

(Exs. 4 and 5).

Appellants contend that appellee did in fact agree to be bound by and did adopt said agreements as early as January 1, 1960, and consequently was required to make contributions to the Trust Funds until at least April 14, 1965.

The respective Trust Agreements (Exs. 2, 3) provide *inter alia* that contributions are to be made monthly (Articles II, Sections 8), that 10% liquidated damages will be assessed for late filings of reports (Articles II, Sections 9), that the Funds will be entitled to an audit of the employer-contributors' pertinent payroll records to ascertain the good faith reporting and remitting of contributions on carpenter man-hours worked for the employer-contributor (Articles IV, Sections 11) (R. 2-3).

**Chronological Statement of Facts:**

The following is a chronological statement of the facts:

(1) Prior to January, 1960, appellee, a general contractor in the construction industry (Tr. 22), had never entered into a labor agreement with the Carpenters Union. Appellee is a member of the Home Builders Association, an employer association, which Association is not a party to the Carpenters Labor Agreement (Tr. 26). Although appellee is a non-union contractor, he nevertheless "packed a (Union) card" himself (Tr. 32). In fact, he has tried to get his non-union men to join the union (Tr. 32).

(2) Shortly before or during January, 1960, appellee telephoned the Carpenters Hall for carpenters (Tr. 24) because he wanted union men and his current employees would not join the union (Tr. 32). The man at the Union Hiring Hall (named "Sam", Tr. 28), said that he would send some men out but that the appellee would have to contribute to the Carpenters Health and Welfare Trust Fund (Tr. 24, 27, 29 R-9). Sam said he would send some forms on which to make remittance to the Health and Welfare Fund and that the forms would require the employees' names, social security numbers and hours worked (Tr. 24). Sam told appellee how much to contribute for each hour (Tr. 24). Forms and carpenters were sent to the appellee (Tr. 25).

(3) On February 18, 1960, appellee executed and delivered to the Health and Welfare Trust Fund the first Remittance Report for the month of January 1960, together with the contribution owing thereon (Ex. 1). On March 15, 1960, appellee executed and delivered the second Remittance Report for the carpenter hours worked in the month of February 1960 (Ex. 1). This Remittance Report contained the following express language in *bold face* type:

> "The undersigned hereby adopts and agrees to be bound by the Trust Agreement dated January 1, 1956, as amended, establishing this Trust Fund, and agrees to make the required contributions to the Trust Fund as provided in the current carpenters' collective bargaining agreement covering Oregon and southwestern Washington."

Appellee placed his signature *immediately below* that language.

(4) On April 15, 1960, appellee filed his third Remittance Report, which also contained the same language, *i.e.,* "The undersigned hereby adopts and agrees to be bound by the Trust Agreement. . . ." etc. Likewise, appellee signed and duly executed the Report and paid the contributions owing thereon.

(5) Appellee thereafter did personally (Tr. 25) sign, execute, and deliver *twenty-seven more such monthly Reports,* being thirty in all, for a period of about *two and one-half years, all of said Reports containing the language,* "The undersigned hereby adopts and agrees to be bound by the Trust Agreement. . . ." etc. The last of said Reports (for the month of June 1962) incorporates language pertaining to the Pension Trust Fund, as follows:

> "The undersigned hereby adopts and agrees to be bound by the Trust Agreements establishing the Health and Welfare Trust Fund and the Pension Trust Fund and agrees to make the required contributions to each of the Trust Funds as provided in the current carpenters' master collective bargaining agreement covering Oregon and Southwestern Washington." (Ex. 1)

(6) During this two and one-half year period, the Administrator of the Trust Funds did send to the appellee remittance forms when he requested them (Tr. 29) and, during this period, the Trust Funds received from and *paid to appellee's carpenter-employees twenty-six claims for benefits* (Tr. 13-15).

(7) After June 1962, the appellee suddenly ceased

making contributions to the Trust Funds and ceased filing said Monthly Remittance Reports, (Tr. 13) in spite of the fact that the current collective bargaining Agreement pertaining to contributions to the Trust Funds required contributions until at least April 14, 1965 (Ex. 5; See Appendix A). The twenty cents an hour previously paid to the Trust Funds by the appellee were now paid by the appellee directly to his employees (Tr. 31) in spite of the fact that Articles II, Sections 4 of the respective Trust Agreements (Ex. 2 and 3) preclude payment of contributions directly to the beneficiaries of the Trusts. The appellee testified that he paid the added twenty cents an hour directly to his employees after ceasing contributions to the Funds because he felt an obligation to make such payment (Tr. 31).

(8) After a number of months had passed without appellants having received any monthly remittances from appellee, appellants demanded an audit of appellee's pertinent payroll records in accordance with Articles IV, Sections 11 of the Trust Agreements (Exs. 2 and 3). Appellee permitted said audit. The audit (Ex. 6) was taken on Oct. 28, 1963 and March 5, 1964, and a total of $1,671.44 was found owing as delinquent contributions and liquidated damages to both Trust Funds ($854.21) to Health and Welfare; $817.23 to Pension) for that period of time from January 1, 1960 through February 15, 1964.

(9) Appellee refused to pay the amounts found owing on the audit, and on or about August 7, 1964, appellants filed these causes in the District Court.

(10) On or about May 10, 1965, trial was had on the consolidated causes; and on May 12, 1965, the District Court (Judge Gus J. Solomon presiding) dismissed appellants' causes without costs on the ground that appellee by executing the Remittance Reports never contractually bound himself to the terms and provisions of the Trust Agreements and the current collective bargaining agreements as they pertain to contributions to the Trust Funds. The pertinent portion of Judge Solomon's opinion and findings is quoted here;

> "The evidence is undisputed that defendant did not enter into the master Carpenters Labor Agreement or any other labor agreement with the Union as an individual. I find that defendant did not intend to be bound by the master Labor Agreement or by the Trust Agreements; that he was unacquainted with any of their provisions; that at no time was he furnished with a copy of the Master Labor Agreement or a copy of the Trust Agreements, or given explanations thereof. When he made payments to the Trust Funds he was unaware that plaintiffs would claim that he would be bound to make payments until April, 1965, when the master Labor Agreement expired. I further find that, except for his initial contact with the Carpenters' business agent, when he asked for carpenters and when he was sent monthly forms, defendant had no conversation with or communication from either the Union or the Trustees during the entire period during which he made payments to the Fund.
>
> "I also find that these reports were signed by defendant solely as an acknowledgment that the number of hours worked and the amount of wages

paid was accurate. Defendant is therefore entitled to a judgment in his favor." (R. 10-11).

## SPECIFICATION OF ERROR

The District Court erred in finding and in dismissing appellants' cause against appellee on the basis that appellee never contractually bound himself to the Trust Agreements (Exs. 2, 3) or to any labor agreements (particularly the provisions in Appendix A).

## SUMMARY OF ARGUMENT

Appellee bound himself to the terms and obligations of the Trust Agreements and to the terms and obligations of the current collective bargaining agreements as they pertain to contributions to the Trust Funds by virtue of having expressly stated in writing about thirty times that he "adopts and agrees to be bound by" said Agreements (Ex. 1).

Furthermore, appellee bound himself to the said Trust Agreements and labor agreements because by virtue of having voluntarily and monthly contributed[3] to

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[3] The Trust Agreements provide for this type of acceptance by individual contributors in Article IX (Ex. 3):

"Section (2) Any individual employer who is not a member of or represented by Employers or a signatory association, but who is performing work of the type coming under the terms of the bargaining agreement and within the jurisdiction of the Union, may become a party to this Agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this Agreement, in a form acceptable to the Board.

"Section (3) Any individual employer who executes and deposits any such written acceptance, or who in fact makes one or

the Funds, he evidences a willingness to be bound thereby and because the Trust Funds, in reliance thereon, did in fact pay benefits to appellee's employees on twenty-six occasions over a two and one-half year period (Tr. 13-15). Not only were his employees receiving benefits under the Trust Agreements, but the appelle was himself getting the benefit of receiving men from the Union Hall: "All I was doing was getting the men by contributing." (Tr. 30).

Specifically, appellee could not terminate his duty to contribute to the Funds in June, 1962, or at any time he desired, but rather he was contractually obligated to continue his contributions as specified in Articles XVII and XVIII of the Carpenters Labor Agreement (Ex. 5; See Appendix A) until April 14, 1965, just as all other contributing employers.[4]

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more contributions to the Fund, assumes and shall be bound by all of the obligations imposed by this Trust Agreement upon the individual employer, is entitled to all rights under this Agreement and is otherwise subject to it in all respects." [Article IX of the Pension Agreement (Ex. 2) is substantially identical.]

[4] The benefits of the Funds are not limited to only union employers or employers who are members of signatory employer associations. The only requirement in such a case is that all such individual contributors observe the same period of obligation and the same rate of contribution as all other contributors. As stated in Article IX, Section (1) of the Trust Agreements: "The parties acknowledge that in order for the Health and Welfare Plan to operate successfully and equitably, all individual employers performing work within the coverage and jurisdiction of the collective bargaining agreement should make contributions to the Fund equivalent to those required by said Agreement, whether or not they are members of, or represented by, the Employers or any signatory association." (Article IX, Section (1) of the Pension Agreement (Ex. 2) is substantially identical).

## ARGUMENT IN DETAIL

### A. Appellee's Defense and the District Court Rationale:

It is important to note that appellee during the course of this lawsuit has never contended or attempted to prove such affirmative defenses as fraud, mistake, or duress. Nor does the District Court opinion find or conclude that there were any affirmative acts by the appellants or by the Union which would lead the appellee to justifiably conclude that he was not bound to the agreements. Nor was there any claim or proof or finding of an unsatisfied condition precedent or of an ambiguity.[5]

The sole thrust of the appellee's argument and the gravamen of the District Court's decision (See p. 8 supra) is that the appellee *never intended* to be bound to the Trust Agreements or the pertinent parts of the current collective bargaining agreements and that he was unacquainted with their provisions, even though he appended his signature to express language which clearly and succinctly states that he does adopt and agree to be bound by such agreements. In other words, appellee's subjective intentions were permitted to override the objective manifestations of his acts.

Appellee's "non-intention", his "unacquaintance", and "his unawareness", without more, are totally irrelevant to contract and commercial law. Beyond the facts of this immediate case, appellants are deeply concerned with a precedent at law which would establish that a

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[5] The only evidence adduced by the defense was appellee's own self-serving testimony.

businessman could avoid his contracts by his own self-serving declaration that he didn't mean what he said he meant.

**B. Some Factually Pertinent Federal Cases:**

In *Lewis* v. *Cable,* 107 F. Supp. 196 (D.C.W.D. Pa. 1952) plaintiffs were trustees of a Welfare and Retirement Fund seeking delinquent contributions from the defendant employer. Defendant had made voluntary contributions to the Fund and then ceased to do so on April 30, 1949.[6] Plaintiffs sued on the basis, *inter alia,* that defendant was obligated to the Fund because "defendant ratified the contracts by making payments thereunder". Defendant contended, *inter alia,* that he "was not cognizant of any legal obligation incurred by me at any time for making such payments".

The court held for the plaintiff Trust Fund, saying:

> "Defendant's defense, therefore, appears to be that subjectively he did not intend to ratify the 1948 Agreement. But the court is of the opinion that it is the manifestation and not the undisclosed intention of the alleged principal which controls. See Restatement of the Law of Agency, § 26 Comment a, § 27 Comment a. See also Restatement of the Law of Contracts, §§ 20, 71. In fact, we are of the opinion that proof of his subjective intent is not material and would not be admissible in evidence. Defendant cannot by his acts and declarations pretend to be bound by the Agreement so as

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[6] Implicit in the reasoning of the court in the *Cable* decision, is the fact that the defendant had not executed a contract *with the Union.*

to prevent strikes and repercussions and then, when full liability under said Agreement is asserted seek to disaffirm it. See Restatement of the Law of Agency, § 96. And his uncommunicated motives in making payments cannot now alter the legal effect of his manifested acts and declarations.

"Defendant further urges, however, that he did not ratify the 1948 Agreement because it is not shown that he had full knowledge of all the material facts concerning the Agreement. We do not agree with this contention. If he did not have full knowledge of all the material facts, the payments and the above letter of defendant indicate to the court a willingness on the part of defendant to ratify the contracts without complete knowledge. See Restatement of the Law of Agency, § 91. He paid over $9,000.00 under the 1948 Agreement. If he thought this was sheer extortion, he would not have paid it. * * * Under these facts, defendant was under a duty to repudiate liability under the Agreement before making payments or acknowledging liability. See Restatement of the Law of Agency, §§ 93, 94. From defendant's acts and declarations, we find, as a matter of law, that he did ratify the 1948 Agreement." *Id.* at 197-98.

And in Footnote 1 of the *Cable* case, the Court states:

"See Restatement of the Law of Contracts, § 71, Comment a, which states 'If the words or other acts of one of the parties have but one reasonable meaning, his intention is material only in the exceptional case, stated in Clause (c), that an unreasonable meaning which he attaches to his manifestations is known to the other party.' In the case *sub judice,* the undisclosed intention of defendant

> was not known to plaintiffs and the payments and letter have but one reasonable meaning. Therefore, any attempt by defendant to prove his undisclosed intention would be immaterial and inadmissible at the trial of this case." *Ibid.*

In the *Cable* case, it is true that the defendant did implicitly acknowledge his indebtedness to the plaintiff Trust Fund by writing a letter wherein he stated that he would pay "just as soon as we go back to work."; whereas in the case, *sub judice,* the appellee Naylor sent no letter acknowledging his legal obligation to plaintiffs. However, appellants contend that appellee did better than that when he signed approximately thirty times his name under the express language: "The undersigned hereby adopts and agrees to be bound by the Trust Agreement . . ." etc.

In *Lewis* v. *Gilchrist,* 198 F. Supp. 239 (D.C.N.D. Ala. 1961), the trustees of a § 302 Trust Fund brought suit against a delinquent employer The employer had signed a bargaining contract with the union requiring contributions. The employer contended, *inter alia,* that the contract was not binding because it was a sham, inasmuch as the oral understanding prior to signing the contract was that it was merely to create the appearance that the employer was bound. It was held that the employer was bound to make contributions under the contract because (1) national labor policy commands enforcement of written contracts between labor and management; (2) defendant employer ratified the contract by actually making monthly contributions on report

forms; and (3) defendant had ratified the contract by virtue of his employees, and even himself, receiving benefits from the fund.[7]

Appellants fully appreciate that in the case *sub judice,* unlike the *Gilchrist* case, there is no contention of a prior oral understanding between the parties which is asserted to vary or alter the terms of the written and signed agreement. However, this only makes appellants' claim stronger. Appellee at no time ever alleged, contended or proved a defense of duress, or fraud, or condition precedent, or mutual mistake by virtue of any facts made prior or subsequent to his signing of the remittance report forms. On the contrary, appellee's solitary contention is that he never understood or intended to enter into a contract with the Trust Funds. He does not attempt to confess and then avoid a signed contract on the basis of affirmative facts, which would render an executed contract voidable; but rather he baldly asserts there was no agreement in the first place because he never subjectively intended to adopt or to agree to be bound by a contract with the Trust Funds. He does this in face of the fact that he appended his signature to the aforesaid express language of agreement and adoption. He not only signed the language once, he *signed it every month for thirty months*![8]

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[7] Id. at 241-42. See also *Lewis* v. *Owens,* 338 F.2d 740 (6th Cir. 1964) where a subsequent act by the employer of executing and delivering monthly report forms and receiving benefits thereunder, *inter alia,* amounted to proof of intent to be bound by the previously signed labor contract.

[8] "The purpose of a signature to an agreement, such as the one involved here, is to evidence or express assent to and accept-

Appellants strongly urge that a man should not be allowed to void his expressly manifested promises by contrary subjective intentions. That is not the law, and it never has been.

### C. Manifested Acts Not Subjective Intent:

Since early common law decisions (*e.g.,* Lord Blackburn in *Smith* v. *Hughes,* LR 6 QB 597 (Eng.)) it has been the fundamental law of contracts and commercial dealings that what a man subjectively intends or understands is not controlling, but rather it is the reasonable interpretation of his manifested acts of acceptance or non-acceptance. Accord: 17 Am. Jur. 2d, Contracts §§ 19, 241, 245; Williston on Contracts, 3d ed. §§ 20, 22; Restatement of Contracts, §§ 20, 71.

> "The law of contracts is not concerned with the parties' undisclosed intents and ideas. It gives heed only to their communications and overt acts." *Kitzke* v. *Turnidge,* 209 Ore. 563, 573, 307 P.2d 522, 527 (1957).

What were appellee's overt acts of manifested intent? (1) He signed specific language of agreement on thirty occasions; (2) He actually filled out and delivered monthly reports to the Funds for two and one-half years together with payment of contributions thereon; (3) His employees were paid and did accept benefits on twenty-six claims; (4) Appellee sought and accepted union carpenters on the contingent that he would make

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ance of the terms of the instrument." *Title & Trust Co.* v. *Nelson,* 157 Or. 585, 592, 71 P.2d 1081, 1084 (1937). See also 17 CJS, Contracts § 62.

contributions to the Funds.[9]

**D. Adoption of Existing Contract:**

It is also axiomatic at law that a person can adopt a contract already existing between other parties and make the rights and obligations under said contract his own.

> "*Adoption of existing contract.* Where a person who is a stranger to a contract deliberately enters into relations with one of the parties which are consistent only with an adoption of such contract, and so acts as to lead such party to believe that he has made the contract his own, he will not be permitted afterward to repudiate it." 17 C.J.S., Contracts § 4 at 562.

The United States Supreme Court has said in *Wiggins Ferry Co.* v. *Ohio & Miss. Railroad Co.,* 142 U.S. 396, 408-09 (1891):

> "* * * It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conducts himself in such a manner as to lead the other party to believe that he has made a contract his own, and his acts are only explicable upon

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[9] Even at common law, where an employer would unilaterally set up a voluntary retirement or health plan with a private carrier for his employees, it has been held that he becomes bound to continue such a program inasmuch as the continued employment of his employees in reliance thereon constitutes the acceptance and consideration. See 56 C.J.S., Master & Servant § 169.

> that theory, he will not be permitted afterwards to repudiate any of its obligations."

In holding a lessee directly bound to a pinball contract initially executed between the lessor and a pinball operator and subsequently acknowledged and accepted by lessee, the Supreme Court of Kansas stated:

> "[I]f a written contract executed by A and B be accepted by C, and acted upon by A and C, although the contract be not assigned by B, it becomes the contract of C as fully as if formally assigned to him." *Burnett* v. *Greenwood,* 179 Kan. 706, 209 P.2d 256, 258 (1956).

### E. Failure of Contracts to Appellee and Failure to Read:

The District Court in part rested its decision upon the finding that appellee never received copies of the Trust Agreements or labor agreements and did not read or was unacquainted with their terms (R. 10). The testimony in support of that finding is contradictory, the appellee claiming he never received any copies (Tr. 25) and appellants claiming that copies are ordinarily sent as a matter of routine business procedure to all new contributors (Tr. 35-37).

Nevertheless, in the absence of an express agreement making the receipt of copies of the contracts a condition precedent to the completion of the contract, there is no legal duty on the part of appellants to send copies. If a man executes an agreement wherein he states that he "adopts and agrees to be bound by" a contract, it must be presumed that he has complete knowledge of the

terms of such contract, and the duty is upon him to acquaint himself with its terms.

> "Defendant further urges, however, that he did not ratify the 1948 Agreement because it is not shown that he had full knowledge of all the material facts concerning the Agreement. We do not agree with this contention. If he did not have full knowledge of all the material facts, the payments and the above letter of defendant indicate to the court a willingness on the part of defendant to ratify the contracts without complete knowledge. See Restatement of Agency § 91." *Lewis* v. *Cable,* 107 F. Supp. 196, 198 (W.D. Pa. 1952).

> "Failure to read a contract before signing it will not, as a rule, affect its binding force. Indeed, the courts appear to be unanimous. . . . It is the duty of every contracting party to learn and know its contents before he signs and delivers it . . . To permit a party, when sued on a written contract . . . to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts. . . . (I)n the absence of fraud or circumstances savoring of fraud, one entering into a contract which refers for some of its terms to an extraneous document, outside the contract paper, is bound also thereby, notwithstanding he omits to inform himself as to the contents of that document or the nature of those terms and conditions where it is possible for him to do so." 17 Am. Jur. 2d. Contracts § 149 at 498-99.